THE CHILD LABOR LAW CASE

ON June 3, 1918, the Supreme Court of the United States held unconstitutional the act of Congress of September 1, 1916, entitled "An Act to prevent interstate commerce in the products of child labor and for other purposes." [1] Mr. Justice Day delivered the opinion of the majority of the court.[2] With the dissenting opinion, written by Mr. Justice Holmes, Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke concurred. The first section of the act is in the footnote.[3]

The court held that the act was not a regulation of interstate commerce, but rather of the hours of labor in manufacturing, — a matter exclusively reserved for state control. It was not held that the act was a regulation of interstate commerce and also of manufacturing; and that the two provisions were inseparable, hence the act was invalid.[4] Nor was any point made in either opinion that the act was not confined to the products of child labor, but being directed against the products of the factory in which the child works, was therefore confiscatory and contrary to the Fifth Amendment.[5]

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[1] C. 432, 39 Stat. 675.

[2] Hammer *v.* Dagenhart, 247 U. S. 251, 38 Sup. Ct. Rep. 529 (1918).

[3] That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the age of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian: *Provided*, that a prosecution and conviction of a defendant for the shipment or delivery for shipment of any article or commodity under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such article or commodity before the beginning of said prosecution.

[4] See United States *v.* Dewitt, 9 Wall. (U. S.) 41 (1869); The Employers' Liability Cases, 207 U. S. 463.

[5] It is remarkable that no distinction was taken in this respect. It might well have

The majority opinion may be divided into two main phases. The first is devoted to showing that the statute is not a regulation of interstate commerce at all. The second rather assumes that the statute deals with interstate commerce, but nevertheless is invalid because of its necessary effect in regulating "hours of labor of children in factories and mines within the States, a purely state authority." The concluding paragraph combines both phases, as follows:

"Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."

The Proposition that the Statute is not a Regulation of Interstate Commerce

The words of the statute are entitled to attention. The statute provides "That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity" having the qualities specified.

In the Dagenhart Case the articles were cotton goods produced in a factory employing children. Section 6 of the act is definitive:

"The term 'ship or deliver for shipment in interstate or foreign commerce' as used in this act means to transport or to ship or deliver for shipment from any State or Territory or the District of Columbia to or through any other State or Territory or the District of Columbia or to any foreign country."

Thus the act does not by its terms regulate manufacture or hours of labor or transportation within a state. As the dissenting justices said:

"The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce."

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been said that such an all-embracing prohibition was merely a penalty upon the manufacturer who employed child labor, was not necessary to the accomplishment of the legislative purpose to prevent the interstate movement of products of child labor and hence not within the authority of such cases as Otis *v.* Parker, 187 U. S. 606 (1903); Purity Extract Co. *v.* Lynch, 226 U. S. 192, 201 (1912). These cases hold that, so far as necessary for proper enforcement, the means adopted to abolish the evil aimed at may include transactions innocent of themselves.

It had been regarded as settled that the transportation of commercial commodities across state lines was interstate commerce.[6] It cannot be that the transportation across state lines of cotton goods even though manufactured by children is not interstate commerce.

The majority of the court nevertheless held that

"The act in its effect does not regulate transportation among the States. . . ."

It is said that

"... the power (over interstate commerce) is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities."

To reach this conclusion it was necessary either to overrule or distinguish the many cases in which the court had held that similar prohibitions of the interstate movement of particular commodities are regulations of interstate commerce. The court referred to the Lottery Case, *Champion* v. *Ames*,[7] the Pure Food Case, *Hipolite Egg Co.* v. *United States*,[8] two White Slave cases, *Hoke* v. *United States*[9] and *Caminetti* v. *United States*,[10] and the Webb-Kenyon Liquor Law Case, *Clark Distilling Co.* v. *West. Md. Ry. Co.*[11]

The statutes in each of these cases are indistinguishable in terms from that in the Child Labor Case so far as the absolute prohibition of the movement of particular commodities in interstate commerce is concerned.[12]

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[6] Welton *v.* Missouri, 91 U. S. 275, 280 (1875); Railroad Co. *v.* Husen, 95 U. S. 465 (1877); Schollenberger *v.* Pennsylvania, 171 U. S. 1 (1898); Southern Ry. Co. *v.* Reid, 222 U. S. 424, 434 (1912).

[7] 188 U. S. 321 (1903).

[8] 220 U. S. 45 (1911).

[9] 227 U. S. 308 (1913).

[10] 242 U. S. 470 (1917).

[11] 242 U. S. 311 (1917).

[12] Absolute prohibitions of the interstate commerce movement of particular commodities are contained in the following statutes:

Act of May 29, 1884, c. 60, 23 Stat. 31 (cattle); Act of February 8, 1897, c. 172, 29 Stat. 512 (obscene literature); Act of May 25, 1900, c. 553, 31 Stat. 188, § 3 (birds killed contrary to state law); Rupert *v.* United States, 181 Fed. 87 (1910); Act of March 3, 1905, c. 1496, 33 Stat. 1264, §§ 2, 4 (cattle); extended in Act of March 4, 1913, c. 145, 37 Stat. 828, 831; United States *v.* Nixon, 235 U. S. 231 (1914); Act of June 30, 1906, c. 3913, 34 Stat. 669, 674, etc. (meat); United States *v.* Lewis, 235 U. S. 282 (1914); Act of April 26, 1910, c. 191, 36 Stat. 331 (insecticides); Act of

The Lottery Act of March 2, 1895,[13] provides:

"That any person who shall cause to be . . . carried from one State to another in the United States, any paper . . . shall be punishable."

The Pure Food Act provides: [14]

"That the introduction into any state . . . or shipment to any foreign country of any article of food or drugs . . . is hereby prohibited; and any person who shall ship or deliver for shipment from any State . . . to any other State . . . or to a foreign country . . . shall be guilty of a misdemeanor."

The White Slave Act of June 25, 1910,[15] provides in section 2:

"That any person who shall knowingly transport . . . in interstate or foreign commerce . . . any woman or girl . . . shall be deemed guilty of a felony."

The Webb-Kenyon Act of March 1, 1913,[16] provides:

"That the shipment or transportation . . . of any spirituous . . . liquor of any kind, from one State . . . into any other State . . . in violation of any law of such State . . . is hereby prohibited."

The cases were not overruled. They were distinguished on the ground that in the Child Labor Case the goods shipped are of themselves harmless and no evil attends their interstate transportation. With reference to the cases cited, the court said:

"They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national,

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August 20, 1912, c. 308, 37 Stat. 315 (nursery stock); Act of March 4, 1913, c. 145, 37 Stat. 828, 832 (virus antitoxins).

Similar prohibitions as to importation in foreign commerce are contained in the following statutes:

Act of June 26, 1848, c. 70, 9 Stat. 237 (drugs and medicinal preparations); Act of August 30, 1890, c. 839, 26 Stat. 414, § 2 (food); Act of October 1, 1890, 26 Stat. 567, c. 1244, 610, 613 (tea); Buttfield *v.* Stranahan, 192 U. S. 470 (1904); Act of August 27, 1894, c. 349, 28 Stat. 509, 552, § 24; repeated in subsequent Tariff Acts of July 24, 1897, 30 Stat. 151, 211, c. 11, § 31; August 5, 1909, 36 Stat. 11, 87, c. 6, § 14; October 3, 1913, 38 Stat. 114, 195, c. 16 (convict-made goods); Act of June 20, 1906, c. 3442, 34 Stat. 313 (sponges); The Abby Dodge, 223 U. S. 166 (1912); Act of April 9, 1912, c. 75, § 10, 37 Stat. 81 (white phosphorus matches); Act of July 31, 1912, c. 263, 37 Stat. 240 (prize-fight films); Weber *v.* Freed, 239 U. S. 325 (1915).

[13] C. 191, 28 Stat. 963.

[14] Act of June 30, 1906, c. 3915, 34 Stat. 768, § 2.

[15] C. 395, 36 Stat. 825.

[16] C. 90, 37 Stat. 699.

possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

"This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless."

Thus the doctrine is not that prohibition of the interstate movement of certain commodities can never be a regulation of interstate commerce. Indeed, it is admitted that in some cases it may be. In the Lottery Case it had been broadly contended that the power to regulate did not include the power to prohibit certain articles; but as Mr. Justice Holmes stated in the Child Labor Case:

"It would not be argued to-day that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something. . . . At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out."

The doctrine of the majority opinion is that the prohibition of the interstate transportation of harmful commodities is a regulation of interstate commerce, whereas the prohibition of the interstate transportation of harmless goods is not. Whether or not the regulation is of transportation across state lines, therefore, depends not upon whether the journey is from one state to another, but upon the character of the goods.

The doctrine thus set forth, however, does not take into account, and the majority opinion did not discuss, the many cases in which prohibitions of interstate transportation of harmless commodities have been expressly held to be regulations of interstate commerce.

Section 6 of the Sherman Anti-Trust Act of July, 1890,[17] pro-

[17] C. 647, 26 Stat. 209.

hibits the transportation of trust-made goods across state lines. The contention that Congress has no power to deal with legitimate articles of commerce was squarely but unsuccessfully pressed by counsel in *United States* v. *American Tobacco Co.*[18]

The Commodities Clause, in language a simple prototype of section 1 of the Child Labor Law, makes it unlawful for any railroad company "to transport from any State . . . to any other State . . . any article or commodity . . . in which it may have any interest, direct or indirect."[19] The statute was sustained in *Delaware & Hudson Co.* v. *United States*,[20] with reference to the transportation of coal, a commodity harmless in and of itself.

The Supreme Court decisions have been even more express and to the point. In a series of cases not considered in the majority opinion, state statutes prohibiting the movement of commercial commodities across state lines have been held invalid precisely because they were regulations of the interstate movement of innocuous commodities.[21]

In the Husen Case the Missouri statute provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county of this State. . . ." The court said:[22]

"It is a plain regulation of inter-state commerce, a regulation extending to prohibition . . . that the transportation of property from one State to another is a branch of inter-state commerce is undeniable, and no attempt has been made in this case to deny it."

The case has been repeatedly followed and approved.[23]

In *Leisy* v. *Hardin*,[24] an Iowa statute held invalid prohibited the sale in the original package of intoxicating liquors brought from outside the state. The ground was that liquor was at that time a legitimate article of commerce. The court said:[25]

"That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of

[18] 221 U. S. 106, 132 (1911).

[19] Act of June 29, 1906, c. 3591, 34 Stat. 584, 585.

[20] 213 U. S. 366 (1918).

[21] Railroad *v.* Husen, 95 U. S. 465 (1877); Leisy *v.* Hardin, 135 U. S. 100 (1890); Schollenberger *v.* Pennsylvania, 171 U. S. 1 (1898).

[22] Page 469.

[23] Reid *v.* Colorado, 187 U. S. 137 (1902); M. K. & T. Ry. Co. *v.* Haber, 169 U. S. 613 (1898); Asbell *v.* Kansas, 209 U. S. 251 (1908).

[24] 135 U. S. 100 (1890).

[25] 135 U. S. 110 (1890).

traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State?"

The court continued as follows:[26]

"To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create."

The last quotation is approved in *Schollenberger* v. *Pennsylvania*,[27] holding void a state statute which forbade the sale of oleomargarine in the original package which was brought into the state from without. On page twenty-five the court said that the statute substantially prohibited the introduction of a pure article and thereby interfered with interstate commerce.[28]

On the basis of these decisions, state courts have been clear that state statutes, prohibiting shipment into the state from other states of convict-made goods, are invalid.[29] Yet, following the Child Labor Law Case, the Congressional prohibition of importation of convict-made goods, which has stood since the act of August 27, 1894,[30] is *ultra vires*, since the goods are harmless.

Let the subject matter be child-made goods, and let the words of the statute prohibit their transportation across state lines; the goods, the journey, and the governing rule the same; if a state legislature enacts the act, it is a regulation of interstate commerce

[26] Page 125.

[27] 171 U. S. 1 (1898).

[28] Brimmer *v.* Rebman, 138 U. S. 78 (1891), Voight *v.* Wright, 141 U. S. 62 (1891), and Minnesota *v.* Barber, 136 U. S. 313 (1809), are cases of state regulations of interstate commerce in sound commodities such as wholesome beef and wheat flour, with the additional element that the regulations substantially discriminated against interstate commerce, an element entirely wanting in the Husen, Schollenberger, and Leisy cases.

[29] People *v.* Hawkins, 157 N. Y. 1, 51 N. E. 257 (1898); Opinion of the Justices, 211 Mass. 604 (1912).

[30] C. 349, 28 Stat. 509, 552.

and invalid, whereas if Congress is the enacting body, it is not a regulation of interstate commerce, and invalid.

It is difficult to believe that the adoption of the Constitution has left this great void of governmental authority. If in the distribution of powers between state and nation a large part of the power to regulate interstate commerce has been lost a weakness in the federal system hitherto unsuspected is developed. Prior to 1787 the states individually were all-powerful to prohibit, by impost, embargo, or otherwise, the importation from other states of any kind of commodity. Sovereign authority has always been understood to embrace power to prohibit for commercial reasons the importation from other states of harmless articles.[31] Conspicuous illustrations of the exercise of such power by the original states between 1783 and 1787 were in the embargoes against commodities brought by British vessels, a matter referred to hereinafter in another connection. There is highest evidence of the existence of such power. The Articles of Confederation state:

"Art. 9. Sec. 1. The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances; provided that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods, or commodities, whatsoever."

It was largely because the power was exercised by each state against harmless products of other states with the selfish view of the effect of the importation upon the commerce and manufacture of the importing state that the Constitution was framed. It was not enough to forbid the states from prescribing rules for the conduct of such interstate shipments. As has been frequently recognized, not part but all the power they had over shipments from one state to another of any character of commodity was vested expressly in the federal government.

As was said in *Gibbons* v. *Ogden*,[32]

"The 'power to regulate commerce,' here meant to be granted, was that power to regulate commerce which previously existed in the States.

[31] See Sligh *v.* Kirkwood, 237 U. S. 52, 59, 61 (1915).

[32] 9 Wheat. (U. S.) 1, 227 (1824).

But what was that power? The States were, unquestionably, supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign State.

"This power (said Mr. Chief Justice Marshall, page 196, 9 Wheat.), like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

In *Brown* v. *Maryland*,[33] after referring to the oppressed and degraded state of commerce previous to the adoption of the Constitution, the Chief Justice said:

"It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States."

In *Welton* v. *Missouri*[34] the court gave clear expression to the rule:

"The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed, — that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."

And in *Houston & Texas Ry.* v. *United States*[35] the court, in summarizing the law, declared:

"First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that where it exists it dominates."

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[33] 12 Wheat. (U. S.) 419, 446 (1827). [34] 91 U. S. 275, 279, 280 (1875).
[35] 234 U. S. 342, 350 (1914).

Whether a regulation governs the transportation of goods across state lines would seem to depend upon the places where the journey begins and ends, and not at all upon the character of the goods or the evil resulting therefrom. Evil may induce the enactment of a regulation. If despite the presumption in favor of constitutionality there is no conceivable relation between the regulation of interstate commerce and a proper public purpose, it would be confiscatory, hence invalid as taking away property without due process of law contrary to the Fifth Amendment. Such, no doubt, would be the case if Congress should arbitrarily prohibit the movement of sound wheat across state lines; but the regulation would not cease to be one of interstate commerce. Its invalidity would be because of the due-process clause of the Fifth Amendment; just as a state law prohibiting the intrastate transportation of sound wheat would be invalid not as a regulation of interstate commerce but because violating the due-process clause of the Fourteenth Amendment. Questions of due process, however, were not considered in the Husen, Leisy, and Schollenberger cases, *supra*, and the Child Labor Case. The only question was as to what constitutes a regulation of interstate commerce.

Let us apply the principle of law that Congress may prohibit interstate transportation if evil results. Whether evil results or not is essentially a question of fact. So far as the validity of the statute depends upon the answer, the judgment of Congress is entitled to great if not conclusive weight. Congress had found that evil did result from the interstate movement of child-made goods. The four dissenting justices were of like opinion.

Whether or not commodities work evil is a matter largely of opinion, as to which the judgment of the community changes. In *Leisy* v. *Hardin*[36] liquor was thought legitimate. Not many years ago lotteries were a proper method of endowing schools and churches. Evil is as evil does. Healthy persons may be barred from states because their mere presence by reason of the prevalence of disease makes an added source of danger. *Compagnie Française* v. *Louisiana Board of Health*.[37] As was said by Mr. Justice McKenna in *Rast* v. *Van Deman*,[38]

[36] 135 U. S. 100 (1890).
[37] 186 U. S. 380 (1902).
[38] 240 U. S. 342, 364 (1916).

"A lottery of itself is not wrong, may be fairer, having less of overreaching in it, than many of the commercial transactions that the Constitution protects. . . . And at one time it was lawful. It came to be condemned by experience of its evil influence and effects. It is trite to say that practices harmless of themselves may, from circumstances, become the source of evil or may have evil tendency."

In *Seven Cases of Eckman's Alterative* v. *United States*[39] Mr. Justice Hughes said:

"It is said that a distinction should be taken between articles that are illicit, immoral or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as 'illicit' . . ."

So, in dealing with the Food and Drugs Act, it was held that Congress could outlaw food as to which misleading statements were made, although the food in itself was perfectly wholesome.

In point of fact the products of child labor are not harmless, and there is a definite evil in their very transportation across state lines. The evil is involved in the movement itself, and its effects are felt both in the state of production and in the state of destination. Transportation of child-made goods encourages the ruin of the lives of future citizens in the state of production. It directly aids this immorality quite as much as the transportation across state lines of girls for the purpose of prostitution. Congress sought to remove the evil caused by the use of facilities over which it alone has control. It sought to remove it no further. Only that child labor was touched which depended upon the use of interstate commerce facilities for consummation of the evil.

Moreover, the interstate transportation of child-made goods unfairly discriminates against citizens of the state of destination. It tends to lower their standards of child-labor protection. It is the same effect sought to be avoided by the prohibition of importation of convict-made goods from foreign countries.[40]

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[39] 239 U. S. 510, 516 (1916).

[40] Act of August 27, 1894, 28 Stat. 509, 552, c. 349, § 24; Act of July 24, 1897, 30 Stat. 151, 211, c. 11, § 31; Act of August 5, 1909, 36 Stat. 11, 87, c. 6, § 14; Act of October 3, 1913, 38 Stat. 114, 195, c. 16; and of the "phossy-jaw" matches, a cheap match causing necrosis in the match-factory worker; Act of April 9, 1912, 37 Stat. 81, c. 75, § 10.

Mr. Justice Holmes, dissenting, said:

"It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. . . .

"The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed — far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused — it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

"But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation, if it ever may be necessary — to say that it is permissible as against strong drink but not as against the product of ruined lives."

THE PROPOSITION THAT THE LAW IS INVALID BECAUSE ITS NECESSARY EFFECT IS TO INVADE THE PROVINCE RESERVED EXCLUSIVELY TO THE STATES.

The second phase of the opinion assumes that the statute deals with interstate commerce, but that this was only in order to accomplish a result in the states beyond the scope of federal authority. The effect of the statute is to control the hours of labor in manufacturing, and the control over interstate commerce cannot be used to this end; for if it could, the power of the states over local matters would be eliminated and our system of government practically destroyed.

The second phase is represented by the following passages:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. . . .

"A statute must be judged by its natural and reasonable effect. *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. . . .

"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. . . . To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states. . . .

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. . . . The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

It is to be noted that the doctrine thus announced is that the natural and necessary effect of the statute upon pure matters of interstate commerce is to be wholly disregarded. This doctrine is entirely new.

Looking to the substance and disregarding the form, closely investigating the purpose and ulterior motives of Congress, paying strict heed to the natural and necessary effect of the statute, assuredly it operates on the interstate transportation of child-made goods. Whatever else it does indirectly, in terms it rules only interstate transportation. And this is done to remove the evils involved in such transportation.

Still regarding the substantial effect, the statute in terms does not prohibit manufacture and does not regulate hours of labor. The manufacturer may produce as he pleases and employ whom he pleases. The manufacturer, who does not ship outside the state, — and sending goods across state lines is not a right which the state can guarantee, — need never know of the existence of the federal statute. The state may make such regulations as it wishes concerning the employment of children. There is no coercion upon it. The federal statute functions only when the interstate transportation begins, that is, only when the jurisdiction of the state ceases to attach.

In all previous cases, moreover, whether arising under the interstate commerce clause or other grants of power to the federal government, the effect upon state policy of an exercise of delegated power has been held to be immaterial. As Mr. Justice Holmes said:

"I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State."

Familiar exercise of the power over interstate commerce where it was clear that state policy over manufacture was necessarily interfered with is found in the acts dealing with lotteries, white slaves, pure food and drugs, liquor, trusts and unfair competition, commodities produced and owned by railroads, cattle inspection, meat inspection, and railroad rates.[41]

The manufacture of lottery tickets, of foods whether adulterated and misbranded or not, of liquor, is quite as much matter of local control as the manufacture of cotton goods. The effect of the federal regulation of interstate commerce upon the local manufacturing is in each case the same. The evil of gambling, fraud, poisoning, and drunkenness is quite as local a matter, just as exclusively subject to state control as the evil of premature and excessive child labor. And the encouragement to the evil by shipment of products in interstate commerce is the same. The evil in *Weeks* v. *United States* was the misrepresentation in New Jersey by a salesman prior to the interstate shipment that a certain extract was a "lemon" product.

As was further said in these cases, it is immaterial that the means adopted by Congress have the character of police regulations.[42]

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[41] In the Lottery Case, Champion *v.* Ames, 188 U. S. 321 (1903); in the Pure Food Case, Hipolite Egg Co. *v.* United States, 220 U. S. 45 (1911); Seven Cases of Eckman's Alterative *v.* United States, 239 U. S. 510, 514, 515 (1916); Weeks *v.* United States, 245 U. S. 618 (1918); as Mr. Justice Holmes said in his dissenting opinion: "The objection that the control of the States over production was interfered with was urged again and again but always in vain."

[42] Hoke *v.* United States, 227 U. S. 308, 323 (1913); Caminetti *v.* United States, 242 U. S. 470, 492 (1917); Seven Cases of Eckman's Alterative *v.* United States, *supra;* Weeks *v.* United States, 245 U. S. 618 (1918).

The same argument was made and rejected in the Anti-Trust cases. The necessary effect of the Anti-Trust Act is to interfere with production in a state. Its design was to break up monopolies, but the actual prohibition of trust-made goods was not held invalid because it has had that necessary effect in states. If unfair competition through transportation in interstate commerce of child-made products cannot be touched by Congress simply because of the effect on local policy, the Sherman Anti-Trust Act and the Clayton Act must be invalid for the same reason. The necessary effect of the Commodities Clause was to nullify the policy which the State of Pennsylvania had followed for generations with reference to combination between coal-producing and coal-carrying companies. This was expressly decided to be no ground for invalidity.[43] Indeed, it has been settled that so far as direct regulation of intrastate rates — as purely a state matter as can be conceived — is necessary in order to effectively carry out the congressional policy with reference to interstate rates, local rates established by state laws may be set aside.[44]

As to foreign commerce, the same objection, repeatedly raised, has suffered the same fate. In *Weber* v. *Freed*[45] it was urged against the validity of a prohibition of the importation of prize-fight films that the act had the necessary effect and was designed to accomplish a police result within the exclusive cognizance of the states. The contention was held to be frivolous. It was so held with reference to opium in *Brolan* v. *United States*,[46] with reference to sponges in *The Abby Dodge*,[47] to tea, in *Buttfield* v. *Stranahan*.[48] So far as matters entirely within the control of the states are concerned, and so far as the necessary effect of the exertion of Congressional power upon such control is concerned, each of these cases is indistinguishable from the Dagenhart Case. If the necessary and designed effect upon state manufacture is the test, every protective tariff measure and the early embargo acts have surely been invalid.

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[43] United States *v.* Delaware & Hudson Co., 213 U. S. 366 (1909); United States *v.* Del., Lack. & West. R. R. Co., 238 U. S. 516 (1915).

[44] Shreveport Case, Houston & Texas Ry. Co. *v.* United States, 234 U. S. 342 (1914); Adams Express Co. *v.* Caldwell, 244 U. S. 617 (1917).

[45] 239 U. S. 325 (1915).

[46] 236 U. S. 216, 217 (1915).

[47] 223 U. S. 166, 176 (1912).

[48] 192 U. S. 470 (1904).

The settled principle is not confined to cases dealing with interstate or foreign commerce.

As Mr. Justice Holmes said in the principal case:

"The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. *McCray* v. *United States*, 195 U. S. 27. . . . Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the Act. 'The judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers.'" [49]

Administration of local property by executors, administrators and trustees seems a matter purely of local control; and on that ground section 11 of the Federal Reserve Act, empowering the federal banks to act in such capacity within the state, was held invalid by the Supreme Court of Michigan. The judgment was reversed by the Supreme Court of the United States in *First National Bank* v. *Fellows*.[50] The state was held incompetent

"to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which under the Constitution it had a right to exercise."

So Congress is not to be denied the right to exercise its power of eminent domain by reason of the effect on state laws or state policy.[51] Yet the passage of title to lands within the state is a matter peculiarly within the state authority.

A more striking example is with reference to the state power over militia. Before the Constitution was adopted it was generally considered that the state control over militia was essential to the

[49] 247 U. S. 278, 279 (1918).

[50] 244 U. S. 416 (1917).

[51] Kohl *v.* United States, 91 U. S. 367 (1875); Chappell *v.* United States, 160 U. S. 499, 509, 510 (1896).

continued existence of the state, a principle embodied in Art. II of the Amendments, as follows:

"A well-regulated militia being necessary to the security of a free state." . . .

It was argued in the recent Selective Draft Law cases that the power of the federal government to draft militiamen would, if exercised without limit, wipe out a vital state organization. The effect was not indirectly upon state policy, but upon the state governmental institution itself. The argument was held to be without merit.[52]

The principle that local affairs are reserved to the states cuts across every grant of power to the federal government. It matters not whether the delegated power is one over interstate commerce or foreign commerce, or taxation or war. Congress cannot invade the province of the states any more by the exercise of one power than another. The Constitution is the fundamental law in time of war as well as of peace. Is then the recent Food and Fuel Act of August 10, 1917,[53] invalid, which empowers the agencies of the federal government to regulate directly and in detail the manufacture and production of foods, feeds, fuel and other necessaries for the conduct of the war?

It may be objected that in each of the cases cited the federal statute was a genuine exercise of authority delegated to meet a real federal problem; that so far as a matter is genuinely interstate, the federal law governing it must prevail; but interstate commerce cannot be used as a pretext for the accomplishment of unlawful results.

Let us assume, despite *Veasie Bank* v. *Fenno*[54] and *McCray* v. *United States*,[55] that a congressional enactment would be void which forbids a man to be transported in interstate commerce; who has been divorced according to some non-uniform statute; or who has refused to purchase Liberty Bonds; or who has manufactured colored oleomargarine. The ground of invalidity would be not only violation of the Fifth Amendment but also that the evil sought to be cured has no conceivable connection with the interstate commerce regulated.

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[52] Selective Draft Cases, 245 U. S. 366 (1918).
[53] C. 53, 40 Stat. 276.
[54] 8 Wall. (U. S.) 533 (1869).
[55] 195 U. S. 27 (1904).

Between the two clear extremes there are many cases as to which there must be reasonable difference of opinion as to whether or not Congress is dealing with a genuine interstate matter. Such a case is the Lottery Act, the Pure Food and Drugs Act, the White Slave Act and the Child Labor Act. Statutes forbidding interstate transportation of goods made by African slaves, or by convicts, or by women at night, or of the product of sweat shops, or made by non-union labor, or by women and children employed at less than a minimum wage, may also be put in the arguable class.

How shall it be determined that the problem is truly an interstate one and the exercise of federal power is *bona fide?* Clearly not by the effect on the states, because that is as great in the one case as in the other. The question is essentially one of fact.

In determining the question definite rules have been long established. As an aid the court consults the legislative environment in which the act was passed, the Senate and House committee reports, and the history of the times.

The prime consideration is the language used in the enactment. The deliberate legislative decision that interstate commerce power is being exercised is entitled to great weight. The legislature is a coördinate branch of the government. It has no *prima facie* case to overcome. It need not demonstrate its power under one particular theory rather than another. An enactment passed in due form cannot be upset on proof that a majority of the Representatives acted under erroneous views of legislative policy. If upon the face of the act any legitimate legislative purpose may be discovered, or rather, unless he who attacks can clearly show no possible proper purpose, the act must be sustained. To use the familiar language of the reports: "Every presumption favors constitutionality."

Further, the question as to the existence of a genuine interstate problem is not to be complicated by the fact that solving it would also cure a local evil, and that in the minds of the public or of the members of Congress the local evil loomed large and induced action on the interstate matter. Such was the situation in the Lottery, Pure Food, White Slave, Liquor and Anti-Trust cases. It was the same in the prohibition of use of the mails to defraud.

When the charge was made that a local police result was the object of the Prize-Fight Film statute, the court answered that it had

no power to examine into the motives of the legislature. *Weber* v. *Freed.*[56] As Mr. Justice Holmes put it:

"But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals."

In *Fletcher* v. *Peck*[57] it was held that a statute good on its face could not be impeached by proof that votes for it had been procured by bribery or corruption. As was said in *In re Kollock*,[58]

"The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

Proof that there is a large local problem, therefore, is not sufficient to show that there is not a genuine interstate problem.

With these principles in mind, how shall the supposititious cases in the doubtful class be decided? Closing the channels of interstate commerce to the products of non-union labor must be held *ultra vires*, according to *Adair* v. *United States*[59] and *Coppage* v. *Kansas*.[60] As to products of sweat shops, of night work by women, and of work by women and children at less than minimum fixed wages, we may not now have sufficient facts to judge.

The basis of federal action in the Child Labor Case, which the majority held insufficient, is, however, shown by the legislative history of the act. The situation which finally compelled Congressional action arose from the truly interstate character of the child-labor evil. The problem arose not solely because of the effect of transportation across state lines, but also because in the federal system are comprised states each with divergent interests, and the nation with its interest in the people as a whole. Years ago Congress ordered an investigation, and a bulky report was printed styled "Report on Condition of Woman and Child Wage Earners in the United States."[61] It appeared that the child-labor regulations of the states were not uniform, and that manufacturers in high standard states, whether correctly or not, felt at a disad-

[56] 239 U. S. 325, 330 (1915).
[57] 6 Cranch (U. S.) 87, 130, 131 (1810).
[58] 165 U. S. 526, 536 (1897).
[59] 208 U. S. 161 (1908).
[60] 236 U. S. 1 (1915).
[61] SEN. DOC. 645, 61st Cong.

vantage with competitors in the states with low standards. The large development of cotton manufacturing in the South, to cite the most conspicuous example, was said to be due to the employment of cheap child labor.[62] The protest that the "unfair competition" of other states would be ruinous repeatedly defeated salutary state measures proposed for the protection of the children.[63] Because the products met in competition in interstate commerce the states were powerless to protect themselves. Ohio and Massachusetts, calling attention to the immoral competition of other states, formally memorialized Congress to act.[64] The matter was stressed in the debates in Congress, the Congressional hearings, and the Committee Reports.[65] The Senate Committee Report stated:[66]

"So long as there is a single State which for selfish or other reasons fails to enact effective child-labor legislation, it is beyond the power of every other State to protect effectively its own producers and manufacturers against what may be considered *unfair competition* of the producers and manufacturers of that State, or to protect its consumers against unwittingly patronizing those who exploit the childhood of the country. This is true because the States have delegated to Congress the power to regulate interstate commerce, and have thus deprived themselves of the power to prohibit the sale within their own borders of products of the child labor of other States." (*People* v. *Hawkins*, 157 N. Y. 1 (1898); *People* v. *Haynes*, 198 N. Y. 622 (1910); Opinion of the Justices, 211 Mass. 605 (1912).)

It was precisely to avoid such interstate friction as developed in child-labor matters that the Constitution was adopted. Would, then, upholding the Child Labor Law result in so much standardization that "our system of government would be practically destroyed?" The question is important, for preservation of local autonomy in local affairs is vital.

Under the tests suggested, standardization would result only so far as necessary to the legitimate exercise of federal power to cure a genuine interstate commerce evil. It would result, moreover,

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[62] 51 CONG. REC. 1047, 1054; 53 CONG. REC. 12308.

[63] See 6 REPORT, *supra*, 152, 160, 176, 178, 179, 194, 196; 53 CONG. REC. 1807, 3026, 12208.

[64] 45 CONG. REC. 5245; 53 CONG. REC. 1002.

[65] See HOUSE REPORT 1400, 63d Cong. 3d sess. 7–9.

[66] SENATE REPORT 358, 64th Cong. 21.

only when Congress affirmatively established the uniform rule. Under the salutary doctrine of *Cooley* v. *Port Wardens*[67] and the Minnesota Rate cases[68] state statutes based on the so-called police power, even though directly interfering with interstate commerce, are valid when not conflicting with the Congressional rule.[69] It may be the national legislature would exercise its power more frequently than in the long run would be politic or expedient. Inexpediency, however, is not lack of power, and often a man as legislator must vote against a bill which as judge he can not say is *ultra vires*.

Our history gives little basis for fear that the legislature would regulate interstate commerce matters too frequently. It would be trite to enumerate the matters within the federal field which the Congress has left to the states.[70] Curiously, in the Webb-Kenyon Law Case it was asserted as ground of unconstitutionality that if the law were sustained, not undue centralization but decentralization would result.[71]

The difficulty with the doctrine of absolute constitutional prohibition of the regulation of interstate commerce because of the effect on local affairs is not solely that expressed in the McCray decision,[72] that the distinction between the judicial and the legislative powers is destroyed, a matter full of danger to the permanence of our institutions; but even more important is the resulting great void in governmental power itself, — the establishment of a zone between nation and state which neither can touch. The result is that the sum total of powers of state and nation is less than the independent states previously had.

During the period from 1783 to 1787 the country had experience with the system under which no common authority existed to de-

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[67] 12 How. (U. S.) 299 (1851).

[68] 230 U. S. 352 (1913).

[69] Asbell *v.* Kansas, 209 U. S. 251 (1908); Missouri, K. & T. Ry. *v.* Haber, 169 U. S. 613 (1898); Reid *v.* Colorado, 187 U. S. 137 (1902); Plumley *v.* Massachusetts, 155 U. S. 461 (1894); Crossman *v.* Lurman, 192 U. S. 189 (1904); Sligh *v.* Kirkwood, 237 U. S. 52 (1915).

[70] For conspicuous examples, see as to interstate ferry rates, Port Richmond Ferry Co. *v.* Hudson County, 234 U. S. 317 (1914), and the utilization of state executive machinery under the Selective Draft Law of May 18, 1917, c. 15, 40 Stat. 76.

[71] Clark Distilling Co. *v.* West Md. Ry. Co., 242 U. S. 311, 322.

[72] 195 U. S. 27, 54 (1904).

termine the commodities and conditions of interstate commerce, — what to encourage and what to prohibit. The resulting commercial anarchy was intolerable.

The defect consisted not alone in the prohibitions by the states of importation of commodities from other states. The want of a single controlling authority to take into account the commercial interests of the entire people was strongly felt. The individual states had attempted to deal with the British trade restrictions which began in 1783 to exclude American merchandise from the West Indies. Massachusetts enacted a retaliatory embargo.[73] As other states saw in this only a means of attracting British shipping to their own ports, the act was repealed by Act of July 5, 1786,[74] which recited: "Whereas, the good intentions of an act . . . are rendered inefficacious, for want of a coöperation of our sister States . . ." The evil of British trade restrictions could not be met because some of the states by inaction made uniformity of regulation impossible.[75]

The history of the trade convention at Annapolis, leading to the constitutional convention of 1787, is familiar. As was stated by the Chief Justice in *Brown* v. *Maryland*,[76] no one cause was more operative in the creation of the present constitutional system than the depressed state of commerce during the Confederation, and the deep general conviction that interstate commerce should be subject to single unified control. It was the essence of the system created that the rules governing the transportation of commodities across state lines should not be made by the states with the view to the industry of each particular state but by a single national legislature with the view to the interests of the nation as a whole.

In the conventions of the states called to ratify the Constitution of 1787 the dread was repeatedly expressed by Patrick Henry and others that if the powers delegated to Congress were exercised to the utmost the states would be practically wiped out of existence. Those who favored the new Constitution did not answer that the powers were not granted. The reply was that since the national legislature would be composed of representatives coming from

[73] Act of June 23, 1785, LAWS AND RESOLVES OF MASSACHUSETTS, 1784–85, 439.

[74] LAWS AND RESOLVES OF MASSACHUSETTS, 1786–87, 36.

[75] 5 ELLIOTT'S DEBATES, 113, 119.

[76] *Supra*, note 33.

the states who would be zealous to protect their local interests, the powers granted would not be abused.[77]

It was realized at the time that local self-government by the states must be preserved, and that too much exercise of federal authority would be pernicious. It was also realized that a single dominant federal authority, especially over interstate commerce, was indispensable. The Constitution embodied both principles. And to insure permanent harmony of operation it was declared in Art. VI, cl. 2, that the federal laws should be the supreme law of the land. Standardization, so far as it was an evil resulting from single control over interstate commerce, was to be suffered rather than the distressful weakness which had preceded.

The result of the decision in the Dagenhart Case seems to be that the grant to Congress of power over commerce among the states was not of complete sovereign power, and not coextensive with the evil sought to be remedied; and that the adoption of the Constitution caused the disappearance — since neither states nor nation may exercise it — of that governmental authority which the states previously had and exercised over the transportation of "harmless" commodities across state lines.

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[77] FEDERALIST, Nos. 28, 31, 45, 46.